IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

AMERICAN ENTRANCE SERVICES, INC.	:	December Term, 2017
	:	Case No. 00051
Plaintiff	:	
	:	
v.	:	Commerce Program
	:	
ACME MARKETS, INC.	:	
	:	
Defendant	:	
	:	Control No. 19013600

ORDER AND MEMORANDUM OPINION

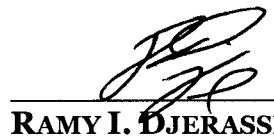
AND NOW, this 13th day of June, 2019, upon consideration of defendant ACME Markets, Inc.'s motion for judgment on the pleadings relating to Count III of plaintiff's Second Amended Complaint, the response in opposition of plaintiff American Enterprise Services, Inc., and the respective *memoranda* of law, it is **ORDERED** that the motion relating to Count III of plaintiff's Second Amended Complaint is **DENIED-IN-PART** and **GRANTED-IN-PART** as follows:

1. The motion is **DENIED** as to the claim of abuse-of-process asserted in Count III of the Second Amended Complaint arising from Mason v. ACME Markets *et al.*, Phila CP No. 1506-04267. As related to Mason, defendant's motion to dismiss plaintiff's claim for punitive damages, asserted in plaintiff's Demand for Relief at paragraph (c), is likewise **DENIED.**
2. The motion is also **DENIED** as to claims of abuse of process asserted in Count III of the Second Amended Complaint arising from Luck v. ACME Markets *et al.*, case No. 11-10304 (Chester County); and Smith v. ACME, (no docket number

provided). The motion to dismiss plaintiff's claims for punitive damages, asserted in plaintiff's Demand for Relief at paragraph (c), are likewise **DENIED** as to Luck v. ACME Markets and Smith v. ACME.

3. The motion is otherwise **GRANTED** as to remaining claims of abuse of process asserted in Count III of the Second Amended Complaint. These claims arise from Roth v. ACME *et al.*, Phila. CP No. 0908-00124, and Fabrizio v. ACME Markets *et al.*, Phila. CP No. 1304-00202. Accordingly, plaintiff's claims for abuse of process related to these two cases are hereby **DISMISSED**. Further, plaintiff's claims for punitive damages related to these two cases, as asserted in plaintiff's Demand for Relief at paragraph (c), are **STRICKEN**.

BY THE COURT



RAMY I. DJERASSI, J.

MEMORANDUM

Before the court is a motion for judgment on the pleadings filed by defendant. For the reasons explained here, the motion is granted-in-part and denied-in-part.

BACKGROUND

Plaintiff American Entrance Services, Inc. (hereinafter, the "Maintenance Company"), maintains and repairs automatic doors found at the entrance of commercial and retail establishments including supermarkets. ACME Markets, Inc. ("ACME"), is a supermarket chain operating in the Philadelphia region which has used Maintenance Company products at many of its stores.

The 2nd Amended Complaint avers that the parties entered into an AUTOMATIC DOORS SERVICE AGREEMENT (the "Agreement"), in 2007.[1] Though the Agreement was written for a one year term, the parties apparently agreed to extend annually unless formally cancelled. Under the terms of this Agreement, the Maintenance Company contracted to provide ACME with "preventive maintenance and emergency services of automatic door systems."[2]

The 2nd Amended Complaint avers that beginning in 2008-2009, ACME began to ignore Maintenance Company warnings that existing supermarket doors needed replacement because they were too old to be properly maintained. The 2nd Amended Complaint also alleges that in 2010, an agent of ACME told the Maintenance Company "to stop all preventative maintenance immediately."[3]

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[1] 2nd Am. Complaint, ¶ 6; AUTOMATIC DOORS SERVICE AGREEMENT, Exhibit A to the 2nd Am. Complaint.
[2] AUTOMATIC DOORS SERVICE AGREEMENT, Exhibit A to the 2nd Am. Complaint, § 1.
[3] 2nd Am. Complaint, ¶ 10.

The 2nd Amended Complaint avers that beginning in 2009, ACME became the target of multiple lawsuits filed by persons claiming to have been injured by malfunctioning doors. ACME joined the Maintenance Company as additional defendant in these lawsuits. ACME alleged that the Maintenance Company had failed to maintain the supermarket doors as promised under the Agreement.[4] According to plaintiff's complaint here, some of these lawsuits were settled without requiring the Maintenance Company to make any payments; in other instances, the Maintenance Company had to pay "small sums" to settle the case. Frequently, however, the Maintenance Company was allegedly required to pay substantial amounts.[5] The 2nd Amended Complaint asserts that ACME joined the Maintenance Company in these lawsuits even though ACME had expressly refused to authorize and pay for such work.[6]

In December 2017, the Maintenance Company initiated the instant action against ACME. In the 2nd Amended Complaint, the Maintenance Company asserts four distinct claims at Count III under the umbrella of abuse of process with punitive damages in Count III.[7] On January 7, 2018, ACME filed an Answer with New Matter. In its New Matter, ACME asserts, *inter alia*, that plaintiff's abuse of process and punitive damages claims are barred by the statute of limitations.[8]

On January 25, 2019, ACME filed the instant motion for judgment on the pleadings. The court is asked to dismiss Count III on grounds its claims are barred by statute of limitations.

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[4] Id., ¶ 19
[5] Id., ¶ 23.
[6] Id., ¶ 24.
[7] Id., at paragraph titled Demand for Relief, p. 11.
[8] New Matter, ¶ 1.

DISCUSSION

Civil rules provide that after pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for judgment on the pleadings.[9] Here, varying outcomes in our Order are explained in progression:

I. Claims sounding in abuse of process are time-barred pursuant to 42 Pa. C.S.A. § 5524.

42 Pa. C.S.A. § 5524 states in pertinent part:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution, or malicious abuse of process.[10]

The Pennsylvania Supreme Court has stated that "a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion," and that a "statute of limitations begins to run as soon as the right to institute and maintain a suit arises."[11]

In this case, the 2nd Amended Complaint asserts that ACME abused process by unjustifiably joining the Maintenance Company in the lawsuits listed below:

- Mason v. ACME Markets *et al.*, case No. 1506-04267 (Philadelphia County);
- Roth v. ACME *et al.*, case No. 0908-00124 (Philadelphia County).
- Fabrizio v. ACME Markets *et al.*, case No. 1304-00202 (Philadelphia County);
- Luck v. ACME Markets *et al.*, case No. 11-10304 (Chester County); and,
- Smith v. ACME-, (no docket number provided).[12]

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[9] Rubin v. CBS Broad. Inc., 170 A.3d 560, 564 (Pa. Super. 2017) citing Pa. R.C.P. 1034(a).
[10] Emphasis added. "The tort of abuse of process is defined as the use of legal process against another primarily to accomplish a purpose for which it is not designed." Lerner v. Lerner, 954 A.2d 1229, 1238 (Pa. Super. 2008). "The usual case of abuse of process is a form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." Rosen v. Am. Bank of Rolla, 627 A.2d 190, 192 (Pa. Super. 1993).
[11] Fine v. Checcio, 870 A.2d 850, 857 (Pa. 2005).
[12] 2nd Amend. Complaint, ¶¶ 20, 24.

II. The abuse of process claim stemming from the *Mason v. ACME Markets, et al*" case is not barred under 42 Pa. C.S.A. § 5524.

To determine whether the Maintenance Company asserted its abuse of process claims in time, we review pertinent dockets and take judicial notice where appropriate.[13]

Docket review shows that in Mason v. ACME Markets *et al.*, Phila CP No. 1506-04267, ACME joined the Maintenance Company on January 27, 2016; therefore, the Maintenance Company must have initiated and maintained an action against ACME no later than by January 27, 2018. This was done successfully; the Mason complaint was filed on December 1, 2017. Therefore, judgment on the pleadings on grounds of limitations relating to Mason is denied and the Maintenance Company's action demanding punitive damages related to Mason may continue.

Also, ACME's motion for judgment on the pleadings on grounds of statute of limitations is denied as to Luck v. ACME Markets *et al.*, Chester CP No. 11-10304, and Smith v. ACME, (no docket number provided). In both situations, this court was not provided with sufficient documentation incorporated to pleadings for judicial notice. Accordingly, plaintiff's claims as to both Luck and Smith continue at this time.[14]

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[13] "A judicially noticed fact must be one not subject to reasonable dispute in that it is either—

> (1) generally known within the territorial jurisdiction of the trial court or
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> (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.... A court may take judicial notice of an indisputable adjudicative fact.... A fact is indisputable if it is so well established as to be a matter of common knowledge. Judicial notice is intended to avoid the formal introduction of evidence in limited circumstances where the fact sought to be proved is so well known that evidence in support thereof is unnecessary." Kinley v. Bierly, 876 A.2d 419, 421 (Pa. Super. 2005) (citing Pa. R.E. 201(b)). An oral confirmation of another court's docket is not sufficient for this court's judicial notice in a motion for judgment on the pleadings.

[14] "[A] motion for judgment on the pleadings is similar to a demurrer. It may be entered when there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law." Wachovia

III. The abuse of process claims stemming from the *Fabrizio* and *Roth* joinders are barred under 42 Pa. C.S.A. § 5524.

However, judicial examination of known dockets concludes that in actions captioned Fabrizio v. ACME Markets *et al.*, Phila. CP No. 1304-00202, and Roth v. ACME *et al.*, Phila. CP No. 0908-00124, ACME joined the Maintenance Company respectively on May 17, 2013, and December 3, 2009. Accordingly, the Maintenance Company was required to initiate actions against ACME no later than May 16, 2015 for Fabrizio and December 3, 2011 for Roth. Both deadlines were blown. ACME's motion for judgment on the pleadings is therefore granted on the Maintenance Company's Count III claims relating to Fabrizio and Roth.

IV. The Maintenance Company's additional argument that each separate joinder constitutes a continuing abuse of process is rejected.

In its response, the Maintenance Company argues that under the "continuing violations doctrine," each improper joinder by ACME constituted a single, continuous abuse of process that tolls the statute of limitations.[15] Specifically, the Maintenance Company argues that each time it was joined by ACME to an underlying lawsuit, ACME committed a continuing abuse of process. The Maintenance Company contends each joinder tolls the otherwise applicable statute of limitations in Fabrizio and Roth. In support, the Maintenance Company relies on Cowell v. Palmer Township.[16] Reliance is misplaced, however, because Cowell hinges on a factual assumption not yet demonstrated by the Maintenance Company by pleadings alone—namely whether whether plaintiff ACME was indeed engaging in wrongful conduct by joining defendant

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Bank, N.A. v. Ferretti, 935 A.2d 565, 570 (Pa. Super. 2007).

[15] Response in opposition to the motion for judgment on the pleadings, ¶ 24.

[16] Cowell v. Palmer Township, 263 F.3d 286 (Pa. E.D. 2001) See In re Stevenson, 40 A.3d 1212, 1221 (Pa. 2012) ("federal courts have only persuasive, not binding, effect on the courts of this Commonwealth").

Maintenance Company to the underlying lawsuits. The disagreement extends also to whether ACME should have known.

In Cowell, land owners ("Owners") planned to sell several lots for commercial development. However, Palmer Township (the "Township"), made changes to the zoning classification, preventing Owners from developing the land as planned. Subsequently, a deal was struck and the Township permitted Owners to proceed on a limited basis with their commercial plans.[17] However, the Township reneged and placed a moratorium on new construction by Owners. To enforce this moratorium, the Township entered liens on two separate lots titled to Owners. One of the liens was subsequently found by a bankruptcy court to have been arbitrary and unlawful.

Some time later and outside bankruptcy court, the Owners initiated a separate lawsuit alleging that the liens had been unconstitutional. The Township moved to dismiss the lawsuit on grounds that the Owners' claims were barred under the statute of limitations. The U.S. District Court granted the motion and dismissed Owners' lawsuit who then appealed.

The threshold issue in U.S. District Court was whether the liens, and other alleged wrongful acts committed by the Township, met the doctrine of continuing violations to toll the statute of limitations.[18] Affirming, the U.S. Court of Appeals for the Third Circuit tested whether Owners had been "aware of the wrongfulness of the liens." Awareness by Owners that they had been harmed by a legal wrong would have required Owners to seek its constitutional redress by legal complaint within the appropriate period under the statute of limitations. The Third Circuit held that the Owners had

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[17] Id.
[18] Id., 294

indeed been aware of the wrongfulness of the Township's liens, as Owners had contested them in bankruptcy court. The Court concluded Owners should have therefore asserted a claim to strike the liens on constitutional grounds "within the applicable limitations period."[19] The Court wrote:

> [t]o allow ... [the Owners] to proceed with their substantive due process claim now would be unfair to the Township and contrary to the policy rationale of the statute of limitations.[20]

In reaching this result the Cowell Court was willing to apply the continuing violations doctrine if it had been established that the harmed party was unaware of the other party's wrongful conduct.

In the case reviewed here, pleadings are inconclusive since it is unknown whether ACME indeed engaged in wrongful conduct. The question is a factual one for trial and we note joinder in personal injury cases, like those ACME has defended for malfunctioning doors, is often routine against parties contracted to make repairs.[21]

BY THE COURT

RAMY I. DJERASSI, J.

[19] Id., 295.
[20] Id.
[21] Trial evidence of course may establish ACME knew its joinders were wrongful and a jury may vote to dismiss based on statute of limitations.